IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs January 23, 2008

DENNIS R. GILLILAND v. STATE OF TENNESSEE

Appeal from the Circuit Court for Dickson County
No. CR8672 Robert E. Burch, Judge

No. M2007-00455-CCA-R3-PC - Filed March 3, 2008

The Petitioner, Dennis R. Gilliland, convicted of felony murder, petitioned for DNA analysis under the Post-Conviction DNA Analysis Act of 2001. The Dickson County Circuit Court summarily dismissed the petition based upon the State's response that the requested DNA comparison occurred prior to the Petitioner's trial and the results were used as evidence of his guilt. The Petitioner now appeals, asserting that further DNA testing of the unidentified sample discovered in the victim's truck may exonerate him and reveal the identity of the actual perpetrator. Because the DNA specimens gathered at the time of the offense have already been compared to the Petitioner's and the victim's blood samples, we affirm the order of summary dismissal.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

Dennis R. Gilliland, Whiteville, Tennessee, Pro Se.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

This is the Petitioner's fourth time before the appellate courts of this state since 1996 when he was convicted of felony murder in connection with the shooting death of Bobby Bush. The factual and procedural history of this case has been summarized in three prior appellate decisions: direct appeal, State v. Dennis R. Gilliland, No. 01C01-9707-CC-00256, 1998 WL 800191(Tenn. Crim. App., Nashville, Nov. 19, 1998) (this Court affirmed the conviction but remanded for resentencing), perm. to appeal granted, (Tenn. June 21, 1999); permission to appeal, State v. Gilliland, 22 S.W.3d 266 (Tenn. 2000) (Tennessee Supreme Court upheld the conviction but, rather than remanding for resentencing, modified the Petitioner's sentence from life imprisonment without

the possibility of parole to life imprisonment with the possibility of parole); post-conviction, Dennis Ray Gilliland v. State, No. M2002-01865-CCA-R3-PC, (Tenn. Crim. App., Nashville, Nov. 14, 2003) (this Court denied the Petitioner post-conviction relief), perm. to appeal denied, (Tenn. Mar. 22, 2004).

On June 23, 2006, the Petitioner filed a petition for post-conviction DNA analysis pursuant to the Post-Conviction DNA Analysis Act of 2001. See Tenn. Code Ann. §§ 40-30-301 to -313. The Petitioner requested "all human biological evidence . . . be held for DNA [a]nalysis." He further asserted that "the human biological evidence ha[d] never been subject[ed] to DNA [a]nalysis for comparison and identification purposes from both [the P]etitioner and/or the alleged victim of cause of action." According to the Petitioner, a reasonable probability existed that the requested analysis would have resulted in a disposition of the case more favorable to him.

The State responded to the petition, noting that forensic scientist Anita Matthews tested the blood specimens removed from the Petitioner's truck and the victim's vehicle and compared those with the Petitioner's and the victim's blood samples. Ms. Matthews concluded that the blood found in the Petitioner's truck was that of the victim. According to the State, Ms. Matthews further opined that the blood in the victim's vehicle was that of the victim and that the Petitioner's DNA was not found in the victim's vehicle. After providing these facts, the State argued that the Petitioner had failed to establish how further DNA testing would have resulted in a more favorable outcome to the Petitioner or demonstrated his innocence or how further DNA testing could have resolved any issue not resolved by previous analysis.

The State also attached Ms. Matthews' report to its response. The report reflected that the probability of randomly selecting another Caucasian, unrelated to the victim and having the same DNA profile as the blood found inside the Petitioner's truck, was one in 286,000. See Gilliland, 1998 WL 800191, at *4. Regarding the analysis of the specimen from the victim's vehicle, Ms. Matthews concluded that the blood was that of the victim and contained "a trace amount of DNA" from an individual other than the Petitioner.

By written order, the post-conviction court summarily dismissed the petition on January 25, 2007. Citing to the information provided by the State in its response, the post-conviction court concluded that the Petitioner's statements in his petition were "plainly false." It is from this determination that the Petitioner now appeals.

ANALYSIS

On appeal, the Petitioner states that he "was not petitioning for his or the victim's DNA to be subjected to analysis, but for the unknown person's DNA that was mixed with the victim's DNA to be analyzed for purposes of comparison." The Petitioner extrapolates that, if this unknown sample had been analyzed for purposes of comparison with other possible suspects, then he would not have been convicted, "as he believes that this DNA may very well have been the DNA of the perpetrator." The State, in response to the Petitioner's arguments on appeal, first notes that the original petition only requested analysis of DNA "for comparison and identification purposes from both [the

P]etitioner and/or the alleged victim[,]" which was the precise analysis already done prior to the Petitioner's 1996 trial. The State further argues the post-conviction court properly dismissed the petition because the identity of the unknown individual "is not inherently any more exculpatory than the simple fact, established by the earlier analysis, that the DNA did not come from the [Petitioner]." We agree with the State that summary dismissal was proper.

The Post-Conviction DNA Analysis Act of 2001 provides that persons convicted of first degree murder may "file a petition requesting the forensic DNA analysis of any evidence that is in the possession or control of the prosecution, law enforcement, laboratory, or court, and that is related to the investigation or prosecution that resulted in the judgment of conviction and that may contain biological evidence." Tenn. Code Ann. § 40-30-303. The post-conviction court must order DNA testing when

> (1) A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis;
>
> (2) The evidence is still in existence and in such a condition that DNA analysis may be conducted;
>
> (3) The evidence was never previously subjected to DNA analysis or was not subjected to the analysis that is now requested which could resolve an issue not resolved by previous analysis; and
>
> (4) The application for analysis is made for the purpose of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice.

Tenn. Code Ann. § 40-30-304. Alternatively, the post-conviction court may order a DNA analysis if it finds as follows:

> (1) A reasonable probability exists that analysis of the evidence will produce DNA results which would have rendered the petitioner's verdict or sentence more favorable if the results had been available at the proceeding leading to the judgment of conviction;
>
> (2) The evidence is still in existence and in such a condition that DNA analysis may be conducted;
>
> (3) The evidence was never previously subjected to DNA analysis, or was not subjected to the analysis that is now requested which could resolve an issue not resolved by previous analysis; and

(4) The application for analysis is made for the purpose of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice.

Tenn. Code Ann. § 40-30-305.

The Post-Conviction DNA Analysis Act of 2001 "does not specifically provide for a hearing as to the qualifying criteria . . . ." William D. Buford v. State, No. M2002-02180-CCA-R3-PC, 2003 WL 1937110, at *3 (Tenn. Crim. App., Nashville, Apr. 24, 2003). Accordingly, "[i]f the [S]tate contests the presence of any qualifying criteria [required by the Act] and it is apparent that each prerequisite cannot be established, the trial court has the authority to dismiss the petition" in summary fashion. Id. at *6.

The post-conviction court is afforded considerable discretion in determining whether to grant a petitioner relief under the Act, and the scope of appellate review is limited. See Jack Jay Shuttle v. State, No. E2003-00131-CCA-R3-PC, 2004 WL 199826, at *4 (Tenn. Crim. App., Knoxville, Dec. 16, 2003) (citation omitted). In making its decision, the post-conviction court must consider all the available evidence, including the evidence presented at trial and any stipulations of fact made by either party. Id. The lower court may also consider the opinions of this Court on direct appeal of a petitioner's convictions or the appeals of a petitioner's prior post-conviction or habeas corpus actions. Id. On appellate review, this Court will not reverse unless the judgment of the lower court is not supported by substantial evidence. See Willie Tom Ensley v. State, No. M2002-01609-CCAR3-PC, 2003 WL 1868647, at *4 (Tenn. Crim. App., Nashville, Apr. 11, 2003).

The Petitioner argues on appeal that the specimen removed from the victim's vehicle, which contained a trace amount of DNA from an unidentified individual, may contain biological evidence that will establish the identity of the murderer. In essence, the Petitioner asserts that he is not the perpetrator of this offense and that testing of this sample will prove his innocence.

First, we must note that the State is correct that such analysis was not requested by the Petitioner in his original petition. See Tenn. R. App. P. 36(a) ("Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error."). Notwithstanding any possible waiver, the Petitioner's request for further testing must fail.

The Act only permits "the performance of a DNA analysis which compares the [P]etitioner's DNA samples to DNA samples taken from biological specimens gathered at the time of the offense." See Earl David Crawford v. State, No. E2002-02334-CCA-R3-PC, 2003 WL 21782328, at *3 (Tenn. Crim. App., Knoxville, Aug. 4, 2003). Thus, the Act does not permit DNA analysis to be performed upon a third party. "[T]he results of the DNA testing must stand alone." See Sedley Alley v. State, No. W2004-01204-CCA-R3-PD, 2004 WL 1196095, at *10 (Tenn. Crim. App., Jackson, May 26, 2004). The specimens retrieved from the vehicles in this case have already been compared to the

Petitioner's and the victim's blood samples. This evidence was available to the Petitioner at the time of trial and was used by the State at trial as evidence of the Petitioner's guilt. See Gilliland, 1998 WL 800191, at *4. Further testing would not resolve any issue not resolved by the previous analysis.

Finally, as the State argues, identifying the donor of the trace amount of DNA in the victim's vehicle would not exonerate the Petitioner as the perpetrator of the murder of Bobby Bush. The Petitioner seeks DNA testing in order to establish the identity of this third party. Such evidence, however, would at best simply establish that this third party had, at some point in time (but not necessarily at the time of the crime), had contact with the victim. See Alley, 2004 WL 1196095, at *10. On direct appeal, this Court summarized the evidence sufficient to uphold the Petitioner's conviction:

> The [S]tate presented evidence showing the [Petitioner] had little money on the night of July 19, 1995; while the victim had a great deal of money. Several hours later, the [Petitioner] had an abundance of cash, while the victim was found dead with only some change on him. The [S]tate presented evidence that the victim's blood was found in the [Petitioner's] truck after the [Petitioner] stated the victim had never been in his truck. Paint consistent with paint samples taken from the victim''s truck was found on the [Petitioner's] bumper. The [S]tate presented evidence that the [victim] was killed with a .20 gauge shotgun slug. The [Petitioner] was known to have had a .20 gauge shotgun and slug ammunition in his possession prior to, and after, the murder. The [Petitioner] was untruthful as to his whereabouts at the time immediately following the victim's murder.

See Gilliland, 1998 WL 800191, at *8. Contrary to the assertions of the Petitioner, the determination of the identity of this unidentified individual will not eliminate him as the perpetrator of this murder. Accordingly, we conclude that the post-conviction court has not abused its discretion in finding that the Petitioner had not established the qualifying criteria for DNA testing and that summary dismissal was appropriate.

CONCLUSION

For the reasons stated herein, we conclude that the post-conviction court did not err in summarily dismissing the Petitioner's request for DNA testing. The judgment is affirmed.

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DAVID H. WELLES, JUDGE